



राजपत्र, हिमाचल प्रदेश (असाधारण)

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, सोमवार, 29 मई, 2006/8 ज्येष्ठ, 1928

हिमाचल प्रदेश सरकार

GOVERNOR'S SECRETARIAT

ORDER

Raj Bhavan, Shimla-2, the 25th May, 2006

No. 43-19 (VIP)/95-GS.—Shri Ravinder Singh Ravi, MLA presented a petition on 5-11-2005 under Article 192 of the Constitution of India seeking removal of Shri Mukesh Agnihotri, Shri Thakur Singh Bharmouri, Smt. Anita Verma, Dr. Prem Singh, Shri Tek Chand, Shri Harsh Wardhan, Shri Lajja Ram, Shri Harbhajan Singh Bhajji, Shri Jagat Singh Negi, Shri Surinder Kumar, Shri Sudhir Sharma & Shri Raghubir Singh all members of Himachal Pradesh Vidhan Sabha from their elective offices as a member of the Himachal Pradesh Legislative Assembly under Article 191 (1) (a) of the Constitution of India as they held the posts of Chief Parliamentary Secretaries/Parliamentary Secretaries for some time, which office according to the petitioner is an office of profit.

Under Article 192 of the Constitution of India, the question of disqualification has to be referred to the Election Commission of India for opinion and has to be decided in accordance with such opinion. On receipt of the petition, I deemed it proper to give all the concerned members of Legislative Assembly an opportunity to file their replies to the petition so that their version is also available to the Election Commission while rendering its opinion on the question. They were given time upto 30th November, 2005 for filing their written replies/statements in answer to the petition. All the MLAs requested for atleast three months more time on 29-11-2005 to file their replies to the petition under Article 192 of the Constitution of India. Keeping in view the reasons given for seeking more time for filing the replies, I considered it appropriate to allow further six weeks time on 5-12-2005. The replies of all the 12 MLAs were received within the time limit fixed.

On receipt of replies of MLA's, the matter was referred to Election Commission of India on 20th January, 2006 for seeking its opinion. All the MLAs have requested for being given an opportunity of hearing preferably through a lawyer as legal issues and interpretation of provision of law were involved. Therefore, this request was also simultaneously forwarded to the Election Commission of India.

Election Commission of India has sent their opinion under Article 192 (2) of the Constitution of India *vide* their letter No. 113/1 (G) HP/2006-JS. 1/3392, dated 18th May, 2006. The Commission is of the opinion that in view of Section 3 (d) of the H. P. Legislative Assembly Members (Removal of Disqualifications) Act, 1971, the opposite parties are protected from any disqualification on account of their appointments as Chief Parliamentary Secretaries/Parliamentary Secretaries. The Election Commission has returned the reference with the opinion of the Commission under Article 192(2) to the effect that the opposite parties are not subject to disqualification under Article 191(1) (a) on the ground raised in the petition dated 5-11-2005 of the petitioner. The opinion of the Election Commission is enclosed at Annexure "A".

Having gone through the opinion received from the Election Commission of India, I, V. S. Kokje, Governor of Himachal Pradesh hereby order that respondents Shri Mukesh Agnihotri, Shri Thakur Singh Bharmouri, Smt. Anita Verma, Dr. Prem Singh, Shri Tek Chand, Shri Harsh Wardhan, Shri Lajja Ram, Shri Harbhajan Singh Bhajji, Shri Jagat Singh Negi, Shri Surinder Kumar, Shri Sudhir Sharma & Shri Raghubir Singh are not disqualified to continue as Members of Himachal Pradesh Legislative Assembly under Article 191(1)(a) of the Constitution of India.

Sd/-
(V. S. KOKJE),
Governor,
Himachal Pradesh

भारत निर्वाचन आयोग
Election Commission of India

निर्वाचन सदन
NIRVACHAN SADAN
अशोक रोड, नई दिल्ली-110 001
ASHOKA ROAD, NEW DELHI-110 001

Reference Case No. 1 (G) of 2006

[Reference from the Governor of Himachal Pradesh under Article 192(2) of the Constitution of India]

In re : Alleged disqualification of Sh. Mukesh Agnihotri and 11 other Members of Himachal Pradesh Legislative Assembly under Article 192(1) of the Constitution of India.

Sh. Ravinder Singh Ravi

... *Petitioner*

Vs.

- (1) Sh. Mukesh Agnihotri, MLA
- (2) Sh. Thakur Singh Bharmouri, MLA
- (3) Smt. Anita Verma, MLA
- (4) Dr. Prem Singh, MLA
- (5) Shri Tek Chand, MLA
- (6) Shri Harsh Wardhan, MLA
- (7) Shri Lajja Ram, MLA
- (8) Shri Harbhajan Singh Bhajji, MLA
- (9) Shri Jagat Singh Negi, MLA
- (10) Shri Surinder Kumar, MLA
- (11) Shri Sudhir Sharma, MLA
- (12) Shri Raghubir Singh, MLA

... *Opposite Parties.*

Present :

For petitioner

1. Sh. Satya Pal Jain, Sr. Advocate
2. Sh. Sandeep Kaushik, Advocate
3. Sh. Pankaj Sharma, Advocate

For opposite parties

1. Sh. Rajiv Atma Ram, Sr. Advocate
2. Sh. Puneet Gupta, Advocate
3. Sh. J. S. Mehta, Advocate
4. Sh. Ravi Bakshi, Advocate
5. Sh. Sandeep Bakshi, Advocate

OPINION

This is a reference, dated 20th January, 2006, from the Governor, Himachal Pradesh, seeking the opinion of the Election Commission under Article 192(2) of the Constitution of India, on the question of alleged disqualification of (1) Shri Mukesh Agnihotri, (2) Shri Thakur Singh Bharmouri, (3) Smt. Anita Verma, (4) Dr. Prem Singh, (5) Shri Tek Chand, (6) Shri Harsh Wardhan, (7) Shri Lajja Ram, (8) Shri Harbhajan Singh Bhajji, (9) Shri Jagat Singh Negi, (10) Shri Surinder Kumar, (11) Shri Sudhir Sharma, (12) Shri Raghbir Singh, for being members of Himachal Pradesh Legislative Assembly, under Article 191(1) (a) of the Constitution of India.

2. The above question arose on a petition, dated 5-11-2005, submitted to the Governor by Shri Ravinder Singh Ravi, MLA, Himachal Pradesh, under Article 192(1) of the Constitution, raising the question of alleged disqualification of the above mentioned 12 MLAs, elected at the general election in 2003, for being members of the Legislative Assembly under sub-clause (a) of clause (1) of Article 191 of the Constitution of India. The allegations raised by the petitioner are that Shri Mukesh Agnihotri was appointed as Chief Parliamentary Secretary in Himachal Pradesh w.e.f. 6th March, 2003 and other MLAs were appointed as Chief Parliamentary Secretaries and Parliamentary Secretaries on 18th April, 2005 in spite of the fact that no such post existed. The petitioner stated that the opposite parties by virtue of their appointments as Chief Parliamentary Secretaries/Parliamentary Secretaries, were entitled to draw salary, compensatory allowance and other perks and facilities, and hence these posts were offices of profit. The petitioner further stated that the appointments of the opposite parties were challenged before the High Court of Himachal Pradesh, in CWP No. 1087/2004. In the same petition, the vires of Himachal Pradesh Legislative Assembly Members (Removal of Disqualification) Act, 1971 (referred to hereinafter as '1971 Act') was also challenged. Under section 3 (d) of the said Act, the office of Chief Parliamentary Secretary/Parliamentary Secretary is exempted from disqualification. The petitioner further contended that the High Court, vide its judgment dated 18-08-2005, allowed the writ petition and declared the appointments of the opposite parties void *ab initio* and directed that from then onwards the opposite parties ceased to be holders of the offices of Chief Parliamentary Secretaries and Parliamentary Secretaries. The High Court also observed that the creation of the posts was not done validly as the due procedures were not followed. According to the petitioner, considering the fact that the High Court declared the appointments of the opposite parties illegal, holding that the posts were not validly created, the opposite parties cannot seek protection from disqualification under Section 3 (d) of the 1971- Act. As regards the challenge against Section 3 (d) of the 1971-Act, the High Court did not go into that issue.

3. At the preliminary stage, the Commission took note of the fact that under the provisions of Section 3 (d) of the 1971-Act, the post of Chief Parliamentary Secretary/Parliamentary Secretary is exempted from disqualification. The petitioner in his petition tried to distinguish between the appointments of the opposite parties as a case of invalid appointments for the purposes of protection under the said Section 3 (d). The petitioner had also made a request for personal hearing. Considering all these aspects, the Commission decided to issue notice to the opposite parties for their reply by 16th March, 2006.

4. The opposite parties filed their reply on 10th March, 2006, a common reply by opposite parties 2 to 11, and a separate reply by Shri Mukesh Agnihotri, opposite party No. 1. The opposite parties submitted that the High Court had only set aside their appointment as Chief Parliamentary Secretaries/Parliamentary Secretaries on the ground of procedural lapses, and that there was no ground for invoking Article 192 in their case. The opposite parties relied on the provision of the

1971-Act and contended that they were fully protected from any disqualification, by virtue of Section 3 (d) of the said Act. They pointed out that the High Court had refused to entertain the challenge against the said Act, and therefore, there was no question of any disqualification in their case under Article 191 (1) (a) of the Constitution. Sh. Mukesh Agnihotri, in his separate reply, took the additional plea that an SLP was filed by him challenging the judgment of the High Court in CPW No. 1087 of 2004. He stated that the said SLP in which notices have been issued, is pending before the Supreme Court and, therefore, the petitioner cannot be permitted to rely on the said judgment. All the opposite parties requested for personal hearing before formulating opinion in the matter.

5. The Commission, considering the request of the petitioner as well as the opposite parties, decided to hear all the parties and, accordingly, fixed a hearing for 28th April, 2006.

6. At the hearing on 28th April, Sh. S. P. Jain, Learned Senior Counsel appearing for the petitioner, submitted that the petitioners were illegally appointed to the post of Chief Parliamentary Secretaries/Parliamentary Secretaries and that they were provided with salaries and other emoluments, perks and facilities. He referred to the order dated 6-12-2004 of the High Court of Himachal Pradesh in CPW No. 506 of 2004, holding that the Chief Parliamentary Secretaries do not perform the duties of Ministers. He contended that in view of this finding of the High Court, the office of Parliamentary Secretaries/Chief Parliamentary Secretaries is neither legislative in nature nor is it akin to that of a Minister. He further referred to the judgment dated 18-8-2005 in CPW No. 1087/2004 wherein the said High Court quashed the appointments of the opposite parties as void *ab initio*. Sh. Jain referred to the findings of the High Court that the opposite parties were usurpers of public office without a valid appointment and, therefore, contended that they could not validly claim protection against disqualification under Section 3(d) of the 1971-Act. According to Sh. Jain, the protection under the said Section would be available only to a person validly appointed to the office of Chief Parliamentary Secretary/Parliamentary Secretary.

7. Sh. Rajiv Atma Ram, Learned Senior Counsel, appearing for the opposite parties 2 to 11, submitted, at the outset, that the opposite parties were appointed to the post of Chief Parliamentary Secretaries/Parliamentary Secretaries and their appointments were quashed by the High Court. He admitted that during the period of their appointment, the opposite parties enjoyed the benefits including remuneration, out of the said office. Referring to the judgment dated 18-8-05 of the Himachal Pradesh High Court in CWP 1087/04, Sh. Atma Ram pointed out that the High Court had declared the appointments as void *ab initio* and further ordered that the opposite parties shall cease to hold the office of Chief Parliamentary Secretaries/Parliamentary Secretaries with effect from that date. He contended that in the present case, the Court applied the doctrine of prospective over-ruling, and directed that the opposite parties would cease to hold the office from the date of the judgment. He contended that if the appointment was to be treated as quashed *ab initio*, then there would be no question of holding any office at all, and if the appointment was set aside prospectively, the effect would be that they were holding the office till that point of time, and during that period, they were protected from disqualification under the provisions of Section 3(d) of the 1971-Act. He contended that, either way, the opposite parties were protected from disqualification in view of the clear provisions under Section 3(d) of the 1971-Act.

8. Shri Ravi Bakshi, learned counsel, appearing for Shri Mukesh Agnihotri, submitted that he was validly appointed to the office of Chief Parliamentary Secretary, entitled to draw benefits and perks, and the office was protected from disqualification under the 1971-Act. He submitted that the High Court, in its order dated 6-12-2004, virtually, acknowledged his appointment as Chief

Parliamentary Secretary, and that this aspect was not considered by the High Court while delivering the judgment in CWP No. 1087/2004. He stated that he has filed an SLP before the Supreme Court against the judgment in CWP No. 1087/2004.

9. Sh. Jain, in his rejoinder, referred to the Constitution (Ninety-first Amendment) Act 2003, amending Article 164 and inserting Article 361B. Under the new Article 361B, there is a disqualification against appointment of a person disqualified under the Tenth Schedule to any remunerative political post. By the amendment to Article 164, the size of Ministry is to be restricted to 15% of the strength of the Lok Sabha/Legislative Assembly. Shri Jain argued that the opposite parties were appointed as Chief Parliamentary Secretaries/Parliamentary Secretaries as they could not be appointed as Ministers in view of the restriction on the number of Ministers under Article 164. According to Shri Jain, these appointments should be viewed keeping in mind the spirit behind the provisions of Articles 164 and 361B. He submitted that when so viewed, the interpretation would be that any appointments frustrating the provisions of the said Articles attract the provisions of Article 191(1) (a). Sh. Jain submitted that appointments of Chief Parliamentary Secretaries/Parliamentary Secretaries would also be subject to the restriction under Article 164, and even Ministers appointed in excess of the 15% limit should be treated as holding office of profit for the purposes of Article 191(1) (a), and in such situations, the 1971-Act should be ignored.

10. On conclusion of the hearing, the parties were given the option of filing their written arguments within a week. Though the petitioner chose not to make any written submissions, the opposite parties filed written arguments.

11. The Commission has carefully considered the arguments of both the sides, both, written and oral. The limited question for determination here is whether the appointments of the opposite parties are covered under Section 3 (d) of the 1971-Act. Shri Mukesh Agnihotri, (Opposite party No. 1) was appointed as Chief Parliamentary Secretary on 6-3-2003, and Sh. Agnihotri has contended that his was a valid appointment with the sanction of the Governor. The other opposite parties were appointed as Chief Parliamentary Secretaries/Parliamentary Secretaries, by two separate orders, both dated 21st April, 2005. It is an admitted fact, as fairly conceded by the learned counsel for the opposite parties, that the opposite parties were in receipt of salary, compensatory allowance, other perks and benefits, by reason of the said appointments. Appointments in all the cases have been made in the name of the Governor. The only point of conflict is on the application of Section 3(d) of the 1971 Act, in respect of these appointments. The petitioner argument is based on the order dated 18-8-2005 of the High Court of Himachal Pradesh in CWP No. 1087/2004. The High Court observed that the creation of posts of Chief Parliamentary Secretary/Parliamentary Secretary and the appointment of the opposite parties to these posts was patently illegal, as this was not seen to have been made in accordance with the Rules of Business framed under Article 166 of the Constitution. The High Court held :

"Resultantly, based on the aforesaid discussion, we have no hesitation also in holding that appointments of respondents No. 3 to 14, right from the threshold were void *ab initio*. We, therefore, hold and declare that their continuance in office based on their illegal and unconstitutional appointment is wholly impermissible in law.

We accordingly direct that from now onwards respondents No. 3 to 14 shall cease to be the holders of the offices of Chief Parliamentary Secretaries and Parliamentary Secretaries with all the consequences."

12. From the above directions, it is observed that the High Court declared the appointments as void *ab initio*, and has gone on to direct that the opposite parties shall cease to hold the offices of Chief Parliamentary Secretaries/Parliamentary Secretaries, from then onwards (*i.e.* from the date of judgment). According to Sh. Rajiv Atma Ram, learned counsel for the opposite parties, the High Court applied the doctrine of prospective over-ruling while it directed that the opposite parties shall cease to hold their offices from the date of judgment. In the view of the Commission, if the appointment is void *ab initio*, the effect would be that there is no appointment of the opposite parties in the eye of law to these posts for any period of time and hence there is no question of any disqualification. On the other hand, if the appointment has been set aside prospectively, the consequence is that the appointment in the capacity of Chief Parliamentary Secretary/Parliamentary Secretary till that point of time is to be treated as beyond question with the result that the opposite parties would be entitled to enjoy all the benefits of the appointment till that point of time. One of the benefits that would be legally available to them is the protection against the disqualification under the provisions of Section 3 (d) of the 1971-Act. Thus, whichever way the order of the High Court is looked at and understood, the opposite parties cannot be deemed to be suffering from any disqualification. The Commission does not see any merit in the argument of Mr. Jain that the spirit of Articles 164 and 361 B should be taken into account while considering question of disqualification in the case raised under Article 192(1), and that any appointment of Ministers including posts such as Chief Parliamentary Secretaries/Parliamentary Secretaries in excess of the limit prescribed under Article 164, should be hit by the disqualification provisions of Article 191(1)(a). In the present case, there is a finding of the Himachal Pradesh High Court (in CWP No. 506/2004) that Chief Parliamentary Secretary's post is not akin to the post of Minister.

13. On the question of exemption from disqualification, it is appropriate to reproduce, for convenience of reference, Article 191(1) (a), the provision under which the opposite parties' disqualification has been sought. This Article reads :

"191. *Disqualifications for membership.*—(1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) If he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder."

The provisions of the above mentioned Article make it amply clear that holding of any office declared by the Legislature of the State as an office not to disqualify the holder, does not lead to any disqualification. The law relevant in the present case, as already seen, is the 1971-Act of the Himachal Pradesh Legislative Assembly. The office of Chief Parliamentary Secretary/Parliamentary Secretary is listed, in clause (d) of Section 3 of the said Act, as an office exempted from disqualification under that Act. Although the validity of the said Section 3 (d) was challenged in CWP No. 1087/2004, the High Court did not go into that question. The Commission also cannot go into that question. Thus, the said Section is valid and its provisions very much applicable as of today for the purpose of the present reference. It is true that the High Court has made adverse observations about the manner in which the appointments of the opposite parties to the offices of Chief Parliamentary Secretaries/Parliamentary Secretaries were made. But, the effect of the order of the High Court on the question of disqualification raised in the present case, has already been discussed above (in paragraph 12). In the written arguments submitted by the opposite parties, there was a

request to defer formulation of opinion in this matter till the SLP filed against the order of the High Court in CWP No. 1087/2004, is disposed of. However, in view of the discussions above, the Commission does not see any need for deferring its opinion. In any event, the question of disqualification raised under Article 191 (1) (a) has to be decided by the Governor, on the opinion tendered by the Commission. This issue is conclusively settled by the Supreme Court's decision in *Election Commission Versus Dr. Subramanian Swamy and others* (AIR 1996 SC 1810).

14. Having regard to the above, the Commission is of the opinion that in view of Section 3 (d) of the 1971-Act, the opposite parties are protected from any disqualification on account of their appointments as Chief Parliamentary Secretaries/Parliamentary Secretaries. Therefore, the present reference from the Governor, Himachal Pradesh, is returned with the opinion of the Commission, under Article 192 (2), to the effect that the opposite parties are not subject to disqualification under Article 191 (1) (a), on the ground raised in the petition dated 5-11-05 of the petitioner herein.

Sd/-
(NAVIN B. CHAWALA)
Election Commissioner

Sd/-
(B. B. TANDON)
Chief Election Commissioner

Sd/-
(N. GOPALASWAMI)
Election Commissioner

New Delhi:
Dated : 18th May, 2006.